

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH GLEN FRAZIER,

Defendant-Appellant.

UNPUBLISHED

April 24, 2007

No. 267518

Branch Circuit Court

LC Nos. 04-118174-FH

04-118176-FH

Before: Servitto, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Defendant pleaded no contest to two counts of second-degree home invasion, MCL 750.110a(3), for which the trial court imposed concurrent sentences of 100 to 180 months in prison. The minimum sentences constituted upward departures from the recommended range of 36 to 71 months under the sentencing guidelines. Defendant appeals from the sentences by delayed leave granted. We affirm, but remand for completion of a sentencing departure form. We decide this appeal without oral argument under MCR 7.214(E).

I. FACTS

Defendant pleaded no contest to the two charges at issue, and the trial court relied on the affidavits of probable cause to arrest underlying the two charges to ascertain the facts. The trial court recited and accepted their accounts of two home invasions, including the participation of an accomplice, and that the property taken in one instance was worth approximately \$50,000. Defendant expressed no disagreement with those factual accounts. At sentencing, the trial court departed from the guidelines range, reasoning as follows:

You're not standing here with clean hands as a first offender. And, when you say that you're being treated differently because of your past record, that's absolutely correct, as it should be.

The Court has gone through the presentence investigation report carefully. I don't know that we'll ever know the full extent of the crimes that you committed or the losses suffered by the victims, both monetarily, physically and emotionally.

The thing that is particularly troubling to the Court, unlike some crimes that come before it, is that fact that you used stealth; you used darkness of night to

commit the crime. You invaded the sanctity of homes of victims, as well. Whether it was because of your alcoholism or other problems, make no mistake about it, what this Court is primarily concerned with is protecting this community from you and the crimes that you have committed.

* * *

Furthermore, police reports reflect over \$200,000 in property was stolen over the course of the Defendant's crime spree. Yet, the defendant expresses no remorse for his actions or for any of the victims.

* * *

The Court is exceeding the guidelines in this case because, as indicated, of the severity of the crimes, the emotional impact upon the victims and the use of darkness and stealth in this particular case not contemplated by the Michigan Sentencing Guidelines.

II. SENTENCING DEPARTURE

Defendant argues that the trial court erred in departing from the recommended guidelines range in this case. We disagree.

A. Standard of Review

In reviewing a trial court's decision to impose a guidelines departure, "whether a factor exists is reviewed for clear error, whether a factor is objective and verifiable is reviewed de novo, and whether a reason is substantial and compelling is reviewed for abuse of discretion" *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). An abuse of discretion occurs where the trial court chooses an outcome falling outside a "principled range of outcomes." *Id.* at 269. In addition, if a trial court articulates multiple reasons for its departure, and we determine that some of the reasons are invalid, we must determine whether the trial court would have departed, and if so to the same degree, on the basis of the valid reasons alone. *Id.* at 260-261, 273. If this Court is unable to make such a determination, it must remand for resentencing or re-articulation. *Id.* at 271.

B. Analysis

1. Substantial and Compelling Reasons

Defendant first argues that the trial court failed to articulate substantial and compelling reasons for its departure. We disagree.

A sentencing court departing from the guidelines must state on the record its reasons for the departure, and may deviate for only a "substantial and compelling reason" MCL 769.34(3). See also *Babcock*, *supra* at 255-256, 272. This legislative language, in light of its statutory and caselaw history, indicates the legislative intent that deviations from sentencing recommendations follow from only objective and verifiable factors. *Id.* at 257-258, 272.

In this case, the trial court expressly identified as its reasons for the departure the severity of the crimes and the emotional impact on the victims. The trial court earlier elaborated that it regarded the crimes as particularly severe because they were committed at night, and caused the victims to suffer an invasion of the sanctity of their homes. The trial court also noted that defendant had a severe record of prior offenses.

At sentencing, one victim recounted that approximately \$10,000 worth of his tools was involved in the crime, reminded the trial court that defendant was apparently involved in many such crimes, admitted that he was not entirely comfortable coming forward, objected to the use of plea bargains, asserted that he had worked for what he had, and asked for the maximum available sentence. The victim added, "I feel that my family and other families were in danger of this. If I would have happened to go out in my garage at this time . . . when he was in there, where would I have been? What could have happened?"

Concerning the severity of the crimes, the trial court emphasized that they were committed at night. The common law elements of burglary included operation at night. See *People v Saxton*, 118 Mich App 681, 690; 325 NW2d 795 (1982). If the crime of home invasion, as a statutory successor to burglary, does not retain darkness of night as an element of the offense, neither does an actor's resort to nighttime constitute an unexpected, aggravating factor. A substantial and compelling reason for a sentencing departure is one that "keenly" or "irresistibly" grabs our attention"; is 'of "considerable worth" in deciding the length of a sentence'; and 'exists only in exceptional cases.'" *Babcock, supra* at 257-258, quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). Defendant's decision to commit his home invasions at night does not bring to light an exceptional circumstance; therefore, that factor did not justify the departure.

Concerning prior offenses, "The court shall not base a departure on an offense characteristic or offender characteristic already taken into account . . . unless the court finds . . . that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b). We note that defendant's total score for prior record variables put him at the highest possible level. The trial court referred to indications that defendant's recent "crime spree" involved over \$200,000 in stolen property, thus impliedly judging the severity of the instant crimes partly in view of the related criminal activity. We conclude that defendant's responsibility for many other crimes and the large dollar value of the stolen property involved, constitute a substantial and compelling, objective and reasonable, basis for a departure.

Although we have determined that some of the trial court's reasons for exceeding the guidelines were invalid, we need not remand for resentencing if, on the record before use, we are able to conclude that the trial court would deviate from the sentencing guidelines to the same degree on the basis of the valid reasons alone. *Babcock, supra* at 260-261, 273. At the sentencing hearing, the trial court made it clear that it considered defendant's offenses to be particularly severe and, therefore, warranted an upward departure from the guidelines. Indeed, the trial court noted that even a reduction in the scoring of offense variable 14 would "not make any difference in the sentence the Court is contemplating." Consequently, on this record, we conclude that the trial court would depart from the guidelines to the same extent based on the substantial and compelling reasons alone. Therefore, remand for resentencing or re-articulation is unnecessary. *Id.* However, we note that the trial court failed to complete the required

sentencing departure form. We therefore remand for this case to the trial court to perform this ministerial task. *People v Armstrong*, 247 Mich App 423, 426; 636 NW3d 785 (2001).

2. *Blakely v Washington*

Defendant also attacks the upward departure on the ground that the trial court imposed it on the basis of facts other than those defendant elected not to challenge in the plea proceeding. Defendant relies on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), where the United States Supreme Court held that “every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment.” *Id.* at 313 (emphasis in the original). However, defendant’s reliance on *Blakely, supra*, is misplaced. Our Supreme Court recently reiterated that “the Michigan system is unaffected by the holding in *Blakely . . .*.” *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006), quoting *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). The Court elaborated, “a defendant does not have the right to anything less than the maximum sentence authorized by the . . . verdict, and, therefore, judges may make certain factual findings to select a specific minimum sentence from within a defined range.” *Drohan, supra* at 159. Accordingly, the trial court was entitled to take into account all the facts and circumstances of the crime, as determined by the trial court from various sources. See *People v Potrafka*, 140 Mich App 749, 751-752; 366 NW2d 35 (1985).

Defendant acknowledges that our Supreme Court has squarely decided this issue adversely to him in *Drohan, supra*, and *Claypool, supra*, but asserts that those cases were wrongly decided. However, we must apply the precedents of our Supreme Court. See *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253 (2002). For these reasons, we must reject defendant’s invocation of *Blakely, supra*, and his disparagement of *Drohan, supra*, and *Claypool, supra*.

Affirmed, but remanded for completion of a sentencing departure form. We do not retain jurisdiction.

/s/ Deborah A. Servitto

/s/ Michael J. Talbot

/s/ Bill Schuette